

MAY 28 2003

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

KENNETH EDWIN JOHNSON,

Defendant - Appellant.

No. 99-15467

D.C. No. CV-96-01545-MHP
CR-93-00153-MHP

MEMORANDUM*

Appeal from the United States District Court
for the Northern District of California
Chief Judge Marilyn Hall Patel, Presiding

Submitted March 13, 2003**
San Francisco, California

Before: RYMER, KLEINFELD, and PAEZ, Circuit Judges.

Kenneth Johnson appeals the district court's denial of his motion to vacate his conviction and sentence under 28 U.S.C. § 2255. We granted a certificate of

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

appealability with respect to whether Johnson was deprived of his Fifth Amendment right to due process and/or his Sixth Amendment right to counsel when the trial court excluded his counsel from two pre-trial in camera hearings regarding disclosure of the government's confidential informants. We have jurisdiction under 28 U.S.C. § 1291 and we affirm. We review *de novo* a district court's decision to deny a motion under 28 U.S.C. § 2255. *United States v. Sanchez-Cervantes*, 282 F.3d 664, 666 (9th Cir. 2002).

The district court's accommodation of Johnson's right to a fair trial and the government's concern for the safety of the confidential informants did not infringe upon Johnson's Fifth or Sixth Amendment rights. The in camera hearings were not a "critical stage" of the criminal proceedings, so Johnson's right to counsel was not violated. *See, e.g., United States v. Bohn*, 890 F.2d 1079, 1082 (9th Cir. 1989) (identifying factors to consider). Johnson's counsel was allowed to submit a list of questions for the district court to ask, the court asked the questions, and Johnson's attorney had a chance to cross-examine the informants before trial. Also, Johnson's counsel forcefully objected to the in camera proceeding and was obviously knowledgeable about the nature of the proceeding. There is no suggestion in the record that she was not useful in helping Johnson understand what was going on. And the in camera hearings involved a preliminary evidentiary question, not the merits of the charges. In these circumstances, neither

Johnson's right to counsel nor his right to due process was violated. *See, e.g., United States v. Anderson*, 509 F.2d 724 (9th Cir. 1974).

Furthermore, we have reviewed the transcript of the first in camera hearing and conclude that the outcome of Johnson's trial would not have been different had defense counsel been present during the in camera hearings. The district court properly denied § 2255 relief based on Johnson's argument that his rights were violated by the exclusion of his counsel from the in camera hearings.

AFFIRMED